

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 21/02/2018****Judgment delivered on: 20/03/2018****CRA No. 200 of 2012**

- Rampyari S/o Late Raghuvir Harijan, aged about 50 years, R/o Village Parcha Post Baikunthpur, Present Add. Hatmen, Katkona, P.S. Patna, Distt. Korea C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through Station House Officer, P.S. Patna, Distt. Korea C.G.

---- Respondent

For Appellant	:	Shri AK Prasad, Advocate.
For Respondent/State	:	Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Sanjay Agrawal****CAV Judgment****Per Pritinker Diwaker, J**

This appeal arises out of the judgment of conviction and order of sentence dated 13.12.2011 passed by the First Additional Sessions Judge, Manendragarh at Baikunthpur, Distt. Korea (CG) in ST No.42/2011 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life and pay a fine of Rs.5000/- with default stipulation.

02. In the present case, name of the deceased is Shakuntala who

was living with the appellant as his wife. According to the prosecution, on 1.1.2011 at about 3.30 pm the accused/appellant set Shakuntala on fire by pouring kerosene on her body. She was immediately taken to medical dispensary at Katkona at 3.45 pm by her neighbours from where considering her serious condition she was referred to SECL Regional Hospital, Charcha. The covering letter issued by Medical Superintendent dated 1.1.2011 is Ex.P/18 wherein it has been recorded that as per history given by the patient she was burnt by her husband after pouring kerosene on her body at about 3.30 pm. This letter further mentions that at the time of referring the patient, she was fully conscious. Information about the burn incident was given to parents of the deceased and on 1.1.2011 itself oral dying declaration was made by the deceased before her mother PW-14 Basanti. Next day her dying declaration Ex.P/8 was recorded by the Executive Magistrate PW-5 M. Bada wherein she has stated as to the manner in which she was burnt by the appellant by pouring kerosene on her. However, in his cross-examination the recorder of dying declaration i.e. PW-5 has stated that answers to the questions put to the deceased were being given by her relatives and the deceased was only nodding her head and at that time she was under the influence of medicine and semi-conscious. Further case of the prosecution is that undated diary statement of the deceased was also recorded wherein she has also stated about being burnt by her husband/appellant. On 3.1.2011 FIR (Ex.P/21) was registered against the appellant under Section 307 of IPC. Contents of the FIR show that the same was recorded on the basis of statements given by the deceased, Basanti (PW-14), dying

declaration (Ex.P/8) made before Executive Magistrate (PW-5) and the letter of Medical Superintendent addressed to the police while referring the patient to Regional Hospital, SECL vide Ex.P/18. During treatment on 23.1.2011 the deceased succumbed to her injuries. Based on the information given by the hospital, merger intimation Ex.P/14 was recorded on 23.1.2011. Inquest over the dead body was conducted vide Ex.P/16 on 23.1.2011 and thereafter the body was sent for postmortem which was conducted on 24.1.2011 by PW-12 Dr. A.K. Singh vide Ex.P/10. The autopsy surgeon noticed superficial to deep burn over trunk, buttock, breast, back, abdomen, back side of thigh, hands, legs; no injury on head, neck, perinium and genitalia and that total percentage of burn wound was about 55% to 65%. In his opinion, cause of death was septicemic shock resulting in cardiac respiratory arrest due to burn and the nature of death co-related with circumstantial evidence collected by police. While framing charge, the trial Court framed charge under Section 302 of IPC against the appellant.

03. So as to hold the accused/appellant guilty, the prosecution examined 16 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In defence, he examined two witnesses.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned

judgment convicted and sentenced the appellant as mentioned above.

05. Counsel for the appellant submits as under:

- (i) that present is a case of either accidental death or of suicide.
- (ii) that dying declaration Ex.P/8 recorded by the Executive Magistrate (PW-5 M. Bada) has rightly not been believed by the trial Court on the ground that it was not recorded at the instance of the deceased but the questions put to the deceased were being answered by her relatives, the deceased was simply nodding her head and that at the time of recording such statement, she was not in a fit state of mind.
- (iii) once the dying declaration recorded by the Executive Magistrate has been disbelieved, the other dying declaration allegedly made by the deceased would be of no consequence.
- (iv) that the contents of Ex.P/18 i.e. letter dated 1.1.2011 addressed by the Medical Superintendent to the police will be of no significance as author of the same has not been examined by the prosecution.
- (v) that the FIR has been registered on the basis of statements of the deceased and her mother Basanti (PW-14), however, once the dying declaration Ex.P/8 itself is not reliable, the other evidence led by the prosecution cannot be relied upon against the appellant.
- (vi) that the oral dying declaration allegedly made by the deceased before PW-14 Basanti is also not reliable as she is an interested witness and there is no other evidence to support her version. Had there been any such oral dying declaration by the deceased before PW-14, in natural course she would have lodged the FIR against the

appellant.

(vii) that the so-called statement of the deceased recorded under Section 161 of CrPC cannot be treated as dying declaration as neither the said document has been exhibited by the prosecution nor there is any entry in the case diary that such statement was ever recorded by the investigating officer.

(viii) that at the time of incident the appellant was not present at home and had gone to village market. This specific plea has been taken by him in his statement under Section 313 of CrPC and defence witnesses have also supported the same.

Reliance has been placed on the judgments in the matters of ***Mukeshbhai Gopalbhai Barot Vs. State of Gujarat, (2010) 12 SCC 224; Banarsi Dass and others Vs. State of Haryana, (2014) 15 SCC 485*** and ***Arvind Singh Vs. State of Bihar (2001) 6 SCC 407***.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

(i) that after the incident the deceased was taken to hospital by her neighbours and not by the appellant.

(ii) as soon as the deceased reached the hospital she informed the treating doctor that she was burnt by her husband and that is why while referring the patient to Regional Hospital, Charcha, the doctor has categorically recorded in Ex.P/18 that the deceased was burnt by her husband. This document can be treated as dying declaration of the deceased.

(iii) as soon as mother of the deceased PW-14 Basanti reached the hospital, the deceased made oral dying declaration before her and PW-

14 has remained intact in the Court.

(iv) that though statement under Section 161 of CrPC of the deceased has not been exhibited but considering the other evidence on record, this statement of the deceased can be treated as an additional link in the chain of incriminating circumstances against the appellant because it lends corroboration to the facts contained in earlier two dying declarations.

(v) that merely on the basis of last three lines of cross-examination of the Executive Magistrate (PW-5), the veracity of the dying declaration recorded by him cannot be doubted and if the overall evidence of this witness is taken into account, it is apparent that such dying declaration was made by the deceased in a fit state of mind.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Samarjeet, PW-2 Shivchand Gupta, PW-3 Ashok Kumar, PW-4 Shrimati and PW-15 Devchand Ravi, neighbours of the appellant and the deceased have turned hostile. PW-5 M. Bada, Executive Magistrate who recorded dying declaration of the deceased Ex.P/8 has stated that while recording the dying declaration the deceased had informed him as to the manner in which she was burnt by the appellant. In a vivid manner he has given the description as to how he recorded dying declaration and how the questions were answered. However, in cross-examination he has stated that when the deceased made dying declaration, drip was being administered to her, she was in semi-conscious condition and that the questions put to her were being

answered by her family members and she was nodding her head. He states that the deceased was not giving answer from her mouth.

09. PW-6 Chaikumar Paikra, Patwari, prepared the spot map Ex.P/5. PW-7 Dr. AK Singh conducted postmortem on the body of the deceased on 24.1.2011 vide Ex.P/10 and noticed superficial to deep burn over trunk, buttock, breast, back, abdomen, back side of thigh, hands, legs; no injury on head, neck, perinium and genitalia and that total percentage of burn wound was about 55% to 65%. In his opinion, cause of death was septicemic shock resulting in cardiac respiratory arrest due to burn and the nature of death co-related with circumstantial evidence collected by police. He has stated that it cannot be said as to whether the death of the deceased was accidental or suicidal or homicidal.

10. PW-8 Surendra Singh Paikdra, PW-9 Janakram Kurre, PW-10 Jeevan Deepak, PW-11 Motiram and PW-13 Sunil Kumar, are formal witnesses.

11. PW-12 Om Prakash Kujur, investigating officer, has supported the prosecution case. He has stated in para-5 that though he had recorded the statement of the deceased and other witnesses, however, inadvertently he could not mention the date of recording of such statements. He states that in the case diary he has mentioned the date of statements and from perusal of the case diary he states that he recorded the statements of Devchand, Rambharan, Shrimati and Ashok Kumar on 3.1.2011. However, the date of recording the statement of the deceased in Charcha Hospital could not be mentioned

in the case diary by mistake.

12. PW-14 Basanti, mother of the deceased, before whom oral dying declaration was made by the deceased on 1.1.2011 in the hospital, has stated that after coming to know about the fact that her daughter is hospitalized at Charcha, when she went there, she was informed by the deceased that she was burnt by the appellant when she asked him to go to his office. She further states that the deceased also informed her that somehow she opened the door, came out of her room and then she was saved by her neighbours who took her to hospital. In cross-examination she reiterates that it was the deceased who informed her about being burnt by the appellant. She admits that her daughter/deceased and the appellant used to live well. Though she states that her daughter used to remain sad as she had no issue but denied the suggestion that she committed suicide on that count. PW-16 Vijay Kumar assisted in the investigation.

13. DW-1 Suresh Solanki and DW-2 Banshlal Kurre have been examined to prove that at the time of occurrence of the incident, the appellant was not at home.

14. As regards the plea of alibi, it is considered as the weakest type of plea and therefore the same is required to be proved through exhaustive, cogent & reliable evidence. DW-1 Suresh Solanki has stated that on the date of incident the appellant met him at about 3-4 pm in the weekly market where they had tea and purchased some vegetables and that in the market itself the appellant was informed by someone that his wife/deceased has suffered burn injuries, on which

they went to the house of the appellant but none was there as by that time the deceased was taken to Katkona hospital. According to the prosecution case, the deceased suffered burn injuries in between 3 and 3.30 pm. There is no evidence adduced by the defence which could show that distance between the appellant's house and the weekly market was as such that it was practically impossible for the appellant to commit the offence and then leave for the weekly market. While raising such plea, the defence has to cover the whole period of the alleged offence to exclude the possibility of physical presence of the accused at the spot during commission of the offence. Plea of alibi can only be taken when such plea postulates physical impossibility of presence of the accused at scene of offence due to his presence at some other place.

15. It is established rule of evidence that burden of proving plea of alibi is on the accused which is to be proved in accordance with law, and such plea must be proved with absolute certainty so as to completely exclude the presence of the person concerned at the time when and the place where the incident took place. To prove his innocence against accusation, accused is required to raise reasonable questions about his absence at place of offence at time of commission of offence and about his presence in some other place at such time. In this way, he is to raise reasonable doubt in mind of court about his participation in commission of offence to get benefit of such doubt against accusation.

16. So far as another defence witness DW-2 Banshlal Kurre is concerned, he has stated that on 31st December, 2010 since night he was with the appellant at his home and thereafter, on 1.1.2011 went with him to weekly market where DW-1 met them and then they had taken snacks and at that point of time somebody informed them that the appellant's wife has burnt herself and thereafter, the appellant went to Katkona with DW-1 and he returned to his home. However, DW-1 nowhere states about presence of DW-2 with the appellant and himself in the weekly market whereas DW-2 claims to be with the appellant throughout from 10 am till 5 pm on 1.1.2011 and never parted company with him during this period. This apart, DW-2 states that he was in the house of the appellant since 31st December, 2010 night, however, no suggestion was given to any of the prosecution witnesses to prove the fact that he was seen with the appellant in the night of 31st December, 2010 and thereafter, was seen moving away with the appellant next morning as claimed by him. Furthermore, the appellant in his statement under Section 313 of CrPC has though taken a plea of alibi, but nowhere states as to with whom he had gone to the weekly market on the date of incident. Thus, in the light of principles of law relating to alibi, if we scrutinize the evidence led by the defence to substantiate the said plea, we find that the defence has not successfully discharged its burden as required under the law and therefore, it cannot be said that at the relevant point of time, the appellant was not at his house.

17. From the evidence it transpires that on 1.1.2011 the deceased sustained burn injuries at 3.30 pm in her house and was taken to

Katkona hospital with the help of her neighbours. Though the neighbours (PWs-1 to 4 & 15) have turned hostile but have admitted the fact that she suffered burn injuries and was taken to Katkona hospital. As per Ex.P/18, she was admitted in Katkona hospital at 3.45 pm where she informed the Medical Superintendent that she was burnt by her husband/appellant and at that time, she was fully conscious, however, for further treatment she was referred to Regional Hospital, SECL, Charcha.

18. True it is that mere exhibition of such a document does not *ipso facto* prove the contents thereof and its author ought to have been examined to prove the same. But the facts contained in the above document finds due corroboration from the oral dying declaration made by the deceased before her mother PW-14 Basanti. According to PW-14, having come to know about the burn incident she went to Charcha hospital where she was informed by the deceased that she was burnt by the appellant when she asked him to go to his office and that somehow she opened the door, came out of her room and then she was saved by her neighbours who took her to hospital. In cross-examination she remained firm and nothing could be elicited from her by the defence to disprove her version. Though the defence has tried to establish that the deceased committed suicide on account depression for not being able to beget child, however, this witness while admitting that her daughter/deceased used to remain sad as she had no issue, has denied the suggestion that she committed suicide on that count.

19. So far as argument regarding reliability of the evidence of PW-14 for being interested witness is concerned, it is well settled principle of law the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other. In such cases it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness was scrutinized with due care and the Court was satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration. To sum up, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

20. In the present case, no such evidence could be adduced by the defence which could suggest that PW-14 has any interest in false implication of the appellant. In cross-examination she admits that she has no personal knowledge about the incident, she came to know about it from the deceased; the appellant and the deceased were living well; it was the day of weekly market; the deceased was taken to Katkona hospital by the neighbours from where she was later referred to Charcha hospital and on the same day i.e. 1.1.2011 the appellant

was detained by the police in police station and no report was lodged by them at the police station. She has denied all the adverse suggestions put to her by the defence and reiterated that the deceased had made oral dying declaration before her naming the appellant as perpetrator of the crime. In the given facts and circumstances of the case, her evidence inspires confidence and appears to be free from the suspicion of falsity.

21. As regards the dying declaration (Ex.P/8) recorded by Executive Magistrate PW-5 M. Bada, the same has been disbelieved by the trial Court for the reason that according to PW-5 himself before recording her dying declaration, no certificate regarding fitness of her mental condition was obtained; she appeared to be under the influence of medicines and was semi-conscious and more particularly, the answers to the questions put to her were being given by her relatives and she was just nodding her head and did not utter anything from her mouth. If we apply the strict principles of law as to the admissibility of dying declaration i.e. it must have been made by the declarant in a fit state of mind without any undue pressure of coercion, then definitely the dying declaration Ex.P/8 in the present case cannot be made basis for conviction of the appellant. However, in the peculiar facts and circumstances of the case where the oral dying declaration, as discussed above, is found to be trustworthy and is consistent with the dying declaration Ex.P/8; no evidence whatsoever is there to show that at the time of recording dying declaration PW-14 was also present there and that the deceased died after 21 days of recording of dying declaration due to septicemic shock resulting in cardiac respiratory

arrest on account of burn injuries, it can be presumed that at the time of recording her dying declaration, she would have been in a position to understand the questions being put to her and in response thereto was nodding her head. Therefore, in our view, the dying declaration Ex.P/8 cannot be discarded *in toto* and can be taken as a corroboratory piece of evidence.

22. Thus, considering the overall evidence, oral and documentary, on record coupled with the false plea of alibi taken by the appellant, we are of the opinion that the findings of guilt recorded by the trial Court convicting the appellant under Section 302 of IPC for commission of murder of his wife Shakuntalal by pouring kerosene on her body, are based on proper appreciation of the evidence and need no interference by this Court.

23. In the result, the appeal being bereft of any substance is liable to be dismissed and is, accordingly, dismissed. The appellant is reported to be in jail, therefore, no further order regarding his arrest/surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(Sanjay Agrawal)

Judge